United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

ORIGINAL

75-7287

To be argued by
JEROME LIPPER

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NOS. 75-7287
75-7320

UNITED BANK LIMITED,
Plaintiff-Appellee,

against

COSMIC INTERNATIONAL, INC.,
Defendant.

JANATA BANK and AMIN JUTE MILLS, LTD.,
Plaintiffs-Appellants,

against

COSMIC INTERNATIONAL, INC. and
IRVING TRUST COMPANY,
Defendants.

(Title continued back of cover)

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLANTS, JANATA BANK AND AMIN JUTE MILLS, LTD. AND SONALI BANK AND NISHAT JUTE MILLS, LTD.

LEON, WEILL & MAHONY
Attorneys for Plaintiffs-Appellants
Janata Bank and Amin Jute Mills, Ltd. and
Sonali Bank and Nishat Jute Mills, Ltd.
261 Madison Avenue
New York, New York 10016
687-5707

JEROME LIPPER
BARRY J. BENDES
Of Counsel

SONALI BANK and NISHAT JUTE MILLS, LTD.,

Plaintiffs-Appellants,

against

IRVING TRUST COMPANY and COSMIC INTERNATIONAL, INC.,

Defendants.

NISHAT JUTE MILLS, LTD. and NATIONAL BANK OF PAKISTAN,

Plaintiffs-Appellees,

against

COSMIC INTERNATIONAL, INC.,

Defendant.

TABLE OF CONTENTS

Table of Authorities

Cases:

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLANTS, JANATA BANK AND AMIN JUTE MILLS, LTD. AND SONALI BANK AND NISHAT JUTE MILLS, LTD.

Preliminary Statement

This supplemental brief is submitted on behalf of plaintiffs-appellants by newly substituted counsel in accordance with permission granted by Order of this Court dated October 22, 1975.

The instant appeal does not involve the consequences of the frequently litigated confiscation of alien assets by a sovereign state for its economic purposes; nor does it involve the discriminatory confiscation of such assets for political purposes (as characterized Cuban action against United States assets following the ascension of Castro). Indeed, this case fits within none of the precedents cited either by the Court below, or by the parties, in which American courts have appropriately and uniformly condemned and refused to enforce such decrees flying, as they do, in the face of our fundamental public policy.

Rather, this is the case of a wartime confiscation of enemy alien property by a belligerent party. Such confiscations, not limited by the strictures of due process but governed by the laws of war, have been uniformly upheld by American courts since our War for Independence. Both precedent and reason dictate that Bangladesh's adoption of precisely the same practice in its war for independence from Pakistan should fare no worse in these very same courts. Specifically, in the instant case, there was the seizure by Bangladesh of debts located in Bangladesh, owing to Pakistani enemy aliens. The circumstance that the debts in issue were secured by funds which happened to be located in New York should not provide the occasion for creating a new public policy which ignores 200 years of precedent.

The wartime takings in issue are not inconsistent with the fundamental public policy of the United States. Further, re-examination on the merits, in any event, is precluded by the act of state doctrine.

The Relevant Facts

The relevant facts of both cases consolidated for appeal are essentially similar. Nishat Jute Mills ("Nishat") and Amin Jute Mills ("Amin") were organized under the laws of Pakistan at a time when the sovereignty of that nation extended to what has since become the sovereign state of Bangladesh (formerly East Pakistan) (JA 47, 139-40). Both companies, controlled by West Pakistanis (JA 47, 140), were engaged in the manufacture and sale of jute products through mills located solely in East Pakistan (JA 48, 140). In addition, Amin maintained its registered or principal office in East Pakistan (JA 47).

Both United Bank ("UB") and National Bank of Pakistan ("NBP") are controlled from Karachi, in West Pakistan (JA 48, 138). Prior to Bangladesh independence, they operated branches in East Pakistan, including the branches involved in the instant case (JA 46, 139, 250).

Nishat and Amin maintained running lines of credit with their respective banks—Nishat with NBP's Dacca office and Amin with UB in Chittagong, both cities in what is now Bangladesh (JA 50, 141).

With respect to the transactions in issue, at various times during the latter half of 1971, Nishat and Amin, respectively, sold and shipped jute and hessian cloth from East Pakistan to Cosmic International, Inc. ("Cosmic") in New York (JA 50-51, 144-48). In every instance, the merchandise was sold subject to a security interest by the shipper's bank, i.e., UB held a lien on the Amin shipment and NBP held a lien on that of Nishat, to secure the re-

payment of loans which, at all relevant times, exceeded the sums in issue here (JA 50, 141, 146-49). With the sale of the liened merchandise, the banks transferred their security to credit documents relating to the goods. UB's Chittagong branch designated Irving Trust Company to collect, for its account, balances to come due from Cosmic at specified future dates pursuant to seven trust receipts (JA 124-37), such proceeds to be applied, in UB's discretion, to reduce Amin's outstanding loans (JA 51-52).

NBP, Dacca, for its part, in each instance of a sale by Nishat to Cosmic, took a consignment of the goods and released the documents in New York against drafts accepted by Cosmic and payable through Irving Trust Company to the order of "National Bank of Pakistan, Dacca", at specified future dates (JA 214-30). NBP was to apply the proceeds to reduce Nishat's indebtedness (JA 141).

Prior to the subject sales, on April 10, 1971, Bangladesh declared its independence from Pakistan, effective March 26, 1971 (JA 52, 149). A war ensued which took a tremendous toll in human suffering, lives and property. By December 1971, the tide of war turned in favor of Bangladesh and by December 16, 1971, Pakistani troops surrendered (JA 52, 149). The catastrophic consequences of the brutal war to Bangladesh—its people and its economy—are a matter of notorious public record. N.Y. Times, Mar. 28, 1971, p. 1, col. 7; *id.*, Mar. 30, 1971, p. 10, col. 4; *id.*, May 10, 1971, p. 4, col. 4; *id.*, Aug. 19, 1971, p. 35, col. 3. The state of war between Bangladesh and Pakistan continues to this day.

By Order dated February 28, 1972, the Government of Bangladesh expropriated all property owned by citizens of Pakistan and vested it in the Bangladesh Government (JA 53, 150). The expropriation decree applied expressly to companies, including banks [JA 74-75, ¶ 2(2)], and ex-

tended to all property, including debts owing to Pakistan nationals [JA 74-75, ¶ 2(5)]. Payments owing on such indebtedness were to be made to the Bangladesh Government [JA 78, ¶ 11(1)]; any payment made in violation of the Order would not be deemed payment of the debt [JA 78, ¶ 11(3)].

By Decree dated March 26, 1972, the assets and liabilities of the expropriated Pakistani banks were transferred to newly created entities; Janata Bank succeeded UB and Sonali Bank replaced NBP (JA 53, 150-51).

The expropriation gave rise to conflicting claims by the new Bangladesh entities and the remnants of the expropriated Pakistan entities to the funds owing by Cosmic, resulting in the instant litigation.

The United States recognized the Government of Bangladesh on April 4, 1972 (JA 55, 152).

The Bangladesh enemy alien property expropriation decree is not inconsistent with United States public policy

As stated by Judge Cardozo, public policy, when applied by our courts to the enactments of foreign states, bars enforcement only to those foreign acts which "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal". *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

In conformity with this exacting standard, this Court and other American courts have refused to enforce, as against fundamental public policy, those acts of a foreign sovereign which attempt to expropriate property located in the United States. American revulsion, as this Court has noted, derives from nothing less than our Constitution which "sets itself against confiscations. . . ." *Republic of*

Iraq v. *First National City Bank*, 353 F.2d 47, 51-52 (2d Cir. 1965), cert. denied 382 U.S. 1027 (1966).

Necessarily implicit in the rationale is that, to the extent our Constitution authorizes confiscations under certain circumstances, such confiscations could hardly be deemed inconsistent with fundamental public policy. The confiscation presently before this Court fits precisely within the latter exception.

"There is no Constitutional prohibition against confiscation of enemy properties [citations omitted]." *United States* v. *Chemical Foundation*, 272 U.S. 1, 11 (1926). Literally from the inception of this nation to the present day, the Supreme Court has uniformly recognized the right of the United States to confiscate the property of enemy aliens, without compensation, in time of war. The power is held to derive from Congress' power to make war under the Constitution, U.S. Const., art. 1, § 8, cl. 11; *Cities Service Co.* v. *McGrath*, 342 U.S. 330 (1952); *Cummings* v. *Deutsche Bank and Discontogesellschaft*, 300 U.S. 115 (1937); *United States* v. *Chemical Foundation*, 272 U.S. 1, 11 (1926); *Stoehr* v. *Wallace*, 255 U.S. 239 (1921); *Miller* v. *United States*, 78 U.S. (11 Wall.) 268 (1871); *Ware* v. *Hylton*, 3 U.S. (3 Dallas) 199 (1796). It is "untrammeled by the due process or just compensation clause". *Cummings* v. *Deutsche Bank und Discontogesellschaft*, 300 U.S. at 120.

The Trading With The Enemy Act implements this war power. 50 U.S.C. App. § 1, *et seq.* (1970). That Act expressly forbids the return of confiscated property to the former owner or payment of compensation therefor. 50 U.S.C. App. § 39(a) (1970).

The power to confiscate enemy property during war is all pervasive. It extends to property of all kinds, including debts, 50 U.S.C. App. § 7(c) (1970). which have an enemy "taint", see *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, 482 (1947), and has been deemed to have world-wide application, even to the extent of applying to

bearer bonds issued by American companies, but held abroad. *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952).

Our courts have even recognized the right of a belligerent enemy to confiscate.

> "The sequestration of enemy property was within the rights of the German government as a belligerent power and when effected left the corporation without right to demand its release or compensation for its seizure, at least until the declaration of peace [citations omitted]. What would ultimately come back to it, as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor." *United States v. S.S. White Dental Mfg. Co.*, 274 U.S. 398, 402 (1927).

Viewed from the perspective of almost 200 years of judicial history confirming the legality of confiscations of enemy alien property under the United States Constitution as a right of belligerency, it admits of no doubt that the confiscation of Pakistan property by Bangladesh in time of war could not "violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted traditional of the common weal". *Loucks* v. *Standard Oil Co.*, 224 N.Y. at 111, 120 N.E. at 202.

> "By comity of nations, rights based upon the law of a foreign state to intangible property which has a situs in this State, are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State. That rule is part of the law of this State, as it is, in general, the law of all countries which accept the reign of law." *Anderson v. N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 19, 43 N.E. 2d 502, 506 (1942).

The principles of comity, and not public policy, are paramount here and require giving effect to the Bangladesh decrees.

Policy, as well as precedent, dictate giving effect to the Bangladesh decree. Wartime confiscation of enemy property is not only designed to "weaken an enemy, and to strengthen [the confiscator]", *Ware* v. *Hylton*, 3 U.S. (3 Dallas) at 227, but to reimburse losses suffered at enemy hands by nationals of the confiscating state. *Cities Service Co.* v. *McGrath*, 342 U.S. at 333-34. The matter of recompense for wartime confiscations and other damage traditionally plays an important role in peace treaty negotiations between belligerents. See, e.g., *Cummings* v. *Deutsche Bank und Discontogesellschaft*, 300 U.S. at 118-19; *Ware* v. *Hylton*, 3 U.S. (3 Dallas) at 230, 237-40; Convention on the Settlement of Matters Arising Out of the War and Occupation (Federal Republic of Germany), October 23, 1954, ch. 6, art. 3(1), [1955] 4 U.S.T. 4411, 4490, T.I.A.S. No. 3425 (1955); Multilateral Peace Treaty with Italy, September 15, 1947, art. 79, 61 Stat. 1245, 1406-07, T.I.A.S. No. 1648 (1947).

It is common public knowledge that Bangladesh suffered grievous and overwhelming losses in its war with Pakistan. American public policy should not be interposed to deprive it of assets which should play a role at the bargaining table in peace discussions with Pakistan.

Indeed, the parties have already taken the first tentative steps toward peace. There has been an exchange of prisoners, N. Y. Times, Apr. 18, 1973, p. 1, col. 1; Apr. 10, 1974, p. 1, col. 5, and Pakistan has granted recognition to Bangladesh, N.Y. Times, Feb. 23, 1974, p. 1, col. 5 (JA 152). There have been meetings between the heads of the respective States, N.Y. Times, Feb. 23, 1974, p. 1, col. 5, and calls by both sides for further discussions. N.Y. Times, Feb. 28, 1974, p. 13, col. 1; Apr. 6, 1974, p. 10, col. 3. The matter of mutual compensation for wartime injuries is one which only Bangladesh and Pakistan can and should ultimately resolve.

A judicial bar to the application of the decrees of Bangladesh would appear to be neither in the long range interests of the parties nor consonant with resolving the concerns expressed by the Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428-44 (1964), and *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 788 (1972), with respect to judicial involvement in foreign policy matters.

The act of state doctrine requires recognizing and giving effect to the decrees of Bangladesh

Both the logic of, and policy underlying, the act of state doctrine call for its application in the instant case. The act of state doctrine is applicable both to tangibles and intangibles. *Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), cert. granted sub nom. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 416 U.S. 981 (1974) (No. 73-1288); *Dougherty* v. *Equitable Life Assur. Soc'y*, 266 N.Y. 71, 87-88, 193 N.E. 897, 902 (1934); *Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft In Basel*, 182 Misc. 776, 45 N.Y.S. 2d 882 (Sup. Ct. 1943).

As this Court stated in *Menendez*, for purposes of the act of state doctrine, a debt is deemed "located" within a state if that state "has the power to enforce and collect it". *Menendez* v. *Saks & Co.*, 485 F.2d at 1364. The power to enforce generally depends upon jurisdiction over the debtor. *Id.*; see *Harris* v. *Balk*, 198 U.S. 215 (1904).

In the instant case, the debts owing by Amin to UB and by Nishat to NBP, respectively, were confiscated by Bangladesh. Both debtors were present in Bangladesh at the time of confiscation, with their principal assets and sole production facilities located there (JA 48, 140). Indeed, Amin maintained its principal office there as well (JA 47). Thus, Bangladesh had the undoubted "power to

enforce or collect [the debt]". The assets of the banks within Bangladesh territory, owned as they were by enemy aliens, passed by decree to the Bangladesh Government.

Under consistent precedent from *Underhill* through *Sabbatino,* the passing of the Amin and Nishat bank indebtednesses to the Government of Bangladesh is conclusive upon our courts. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 415 (1964); *Ricaud* v. *American Metal Co.,* 246 U.S. 304, 310 (1918); *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 303 (1918); *Underhill* v. *Hernandez,* 168 U.S. 250, 252-53 (1897).

What, then of the property securing the debts? It is established that, in the ordinary course, "the transfer of the debt . . . carried with it, as incident thereto, all the securities for its payments". *Stillman* v. *Northrup,* 109 N.Y. 473, 482, 17 N.E. 379, 383 (1888). Accord, *Brainerd, Shaler & Hall Quarry Co.* v. *Brice,* 250 U.S. 229 (1919). Recognition by this Court of the binding effect of the debt expropriation, without giving the new title holder of the debt the benefit of the security, would create the anomaly of awarding security for a debt to one not the owner of the debt while leaving the debt unsecured. It would be akin to recognizing the confiscation of a tangible under the act of state doctrine, while barring an action by the new owner for the purchase price.

Dougherty v. *Equitable Life Assur. Soc'y,* 266 N.Y. 71, 193 N.E. 897 (1934), cited with approval in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. at 424-25, is instructive in the instant case. In *Dougherty,* plaintiffs sued to recover payment under certain life insurance policies taken out by Russian citizens in Russia and governed by Russian law. The policies expressly made the assets of the insurer located outside of Russia security for indebtednesses to beneficiaries under the policies. With the advent of Communist rule, life insurance contracts were, by government decree, annulled and cancelled in Russia. Beneficiaries

under the policies thereupon attempted to look for payment to the security for the indebtedness located in the United States. New York's highest court, applying the act of state doctrine, rejected the claim. It reasoned that the security derived from the debt and that when the debt ceased to exist by Soviet fiat, the creditors' claims ceased and the security fell with it. Under this reasoning, it should follow that where a debt is transferred by government decree, the security for the indebtness follows it.

In *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F. Supp. 892 (S.D.N.Y. 1968), modified on other grounds, 433 F.2d 686 (2d Cir. 1970), cert. denied, 403 U.S. 905 (1971), the Court recognized the impact on ownership of a United States registered trademark resulting from an act of state by West Germany. The Court there stated, in language applicable here:

> "[T]he mere fact that the foreign state's act, in addition to regulating matters within its territorial jurisdiction, may have some indirect impact outside its territory, does not preclude our treatment of it as an 'act of state'." 293 F. Supp. at 911.

Similarly, here it is not a case of enforcing Bangladesh law in the U.S. but rather of necessarily recognizing the force of Bangladesh law in Bangladesh and accepting its consequences.

Application of the act of state doctrine in this case would also be a vindication and recognition of the important policies underlying the act of state doctrine which were exhaustively discussed in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), and *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972).

In the *First National City Bank* case, at least five members of the Supreme Court made clear their view that the act of state area involved "political questions of great sensi-

tivity" which are best left to the Executive since the courts are ill equipped to deal with them. 406 U.S. at 788. In *Sabbatino,* the High Tribunal forcefully pointed out the inevitability of conflict between the courts and the State Department were courts to delve into matters involving acts of state. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. at 432 n.

Justice Harlan, speaking for eight Justices, observed:

> ". . . It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. at 430; see *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. at 788.

All of the sensitivities and concerns raised by the Supreme Court are present in the instant case far beyond those which afflicted the cases before it. Those were cases involving mere economic experimentation and politically motivated economic sanctions against alien property. Here, the Court deals with the very survival of a nation and its people engaged in a bloody and costly war for independence against a powerful adversary. It is respectfully submitted that it would impermissibly frustrate the overriding purpose of the act of state doctrine for an American court to advise an embattled State with whom our government is on friendly terms, that its steps to enfeeble its enemy by way of confiscation of enemy property so offend our public policy that we will block realization of the fruits of the expropriation merely because the security underlying the expropriated property found its way to our shores.

Conclusion

The Bangladesh acts of state here in issue are clearly not inconsistent with fundamental United States public policy. In any event, the acts fall within the purview of the act of state doctrine.

The decision of the United States District Court should be reversed and the funds here in issue awarded to the Janata Bank and Sonali Bank, respectively.

Dated: New York, New York
October 31, 1975

Respectfully submitted,

LEON, WEILL & MAHONY
Attorneys for Plaintiffs-Appellants, Janata Bank and Amin Jute Mills, Ltd. and Sonali Bank and Nishat Jute Mills, Ltd.

JEROME LIPPER
BARRY J. BENDES
of Counsel

Due and timely service of TWO copies of the within BRIEF is hereby admitted this 3RD day of NOVEMBER 1975

.....
Attorney for PLAINTIFFS-APPELLEES-APPELLANTS MISHKIT JUTE MILLS

COPY RECEIVED
OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
Attorneys for National Bank of Pakistan
Date 11/3/75 11:10 AM

Curtis, Hedges & Mallon
ATTORNEYS FOR PLAINTIFF-APPELLEE-APPELLANT UNITED BANK LIMITED

RECEIVED
1975 NOV -3 PM 12 28

Wentworth, Stimson, Putnam & Roberts
ATTORNEYS FOR DEFENDANT APPELLEE IRVING TRUST COMPANY

11/3/75 Burlingham Underwood & Lord
ATTORNEYS FOR DEFENDANT-APPELLEE COSMIC INTERNATIONAL INC